U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Sep2002

CASE NO.: 2000-STA-38

In the Matter of:

DAVID L. BLACKANN
Complainant

v.

ROADWAY EXPRESS, INC.
Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, 49 U.S.C. § 31105, and its implementing regulations, 29 C.F.R. Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules.

On April 17, 2001, the undersigned issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision. In that Order the undersigned dismissed several of Complainant's allegations, but determined that a genuine issue of material fact existed as to four allegations of protected activity.

A hearing was held in Akron, Ohio on July 30- 31, 2001 at which time all parties were afforded an opportunity to present evidence and argument, as provided in the Act and implementing regulations. During the hearing Complainant's exhibits (CX) 1- 43 were admitted into evidence. Respondents exhibits (RX) 1-19, 24-29, 31-34, and 36-37 were also admitted into evidence. On November 13, 2001, Complainant's Post-Hearing Brief was submitted. On November 14, Respondent's Proposed Findings of Fact, conclusions and Order was submitted. On January 4, 2002, Respondent submitted a Reply to Complainant's Post-Hearing Brief. Complainant submitted a Reply Brief on January 8, 2002.

I. BACKGROUND

On October 5, 1990, Respondent, Roadway Express, Inc. ("Roadway"), hired Complainant, David L. Blackann, to drive a commercial motor vehicle with a gross vehicle weight rating of 10,001 or more pounds. (Tr 16). In 1997 and 1998, Complainant worked as a driver out of Respondent's terminal at North Lima, Ohio. (Tr 19).

Complainant received multiple warning letters for prohibited conduct during his employment. On April 29, 1998 a local hearing was held by the union and company representatives at the Teamsters Local #377 regarding his accumulated work record which resulted in his discharge. Subsequently, the discharge was reduced to a 30 day suspension. (RX 3). After returning from the 30 day suspension, Complainant received warnings for additional infractions. A listing of these warnings was compiled by Complainant's supervisor:

12/05/97	Warning Letter	DOT violation logged over 70 hours on 12/05/97 & 12/06/97
12/23/97	Warning Letter	Unexcused absence from 19:30 on 12/12/97 - 23:45 on 12/15/97.
1/20/98	Warning Letter	Failure to follow instructions. Logged break time as "on duty" on 1/12/98.
4/1/98	Letter	Unexcused absence from 7:30 on 1/30/98 to 12:95 on 4/27/98.
4/28/98	Notice of Suspension	Hearing scheduled based on accumulated work record. [union and Roadway settled on thirty day suspension prior to the hearing].
7/20/98	Warning Letter	Failure to meet schedule. Ran late on trip from Mifflintown to North Lima, 8.15 hours on a 5 hour drive.
8/07/98	Warning Letter	Act of insubordination on 8/06/98.
8/19/98	Warning Letter	Failure to meet schedule: ran late on trip from Buckhorn to North Lima, 7.73 hours on a 5 hour drive.
8/20/98	Warning Letter	Failure to meet schedule. Ran late on trip from North Lima to Harrisburg, 8.45 hours on a 5 hour drive.
8/21/98	Warning Letter	Failure to meet schedule. Ran late on trip from Buckhorn to North Lima, 7.68 hours on a 5 hour drive.
8/25/98	Warning Letter	Failure to meet schedule. Ran late on trip from Hagerstown to North Lima, 8.53 hours on a 5 hour drive.
9/12/98	Warning Letter	Violated work rules on fatigue slide, 8.20 hours on a maximum of 8 hours.

(EX 2).

Based on his accumulated work record, Complainant was discharged after a local hearing was held by the Complainant's union and company representatives on September 15, 1998. (RX 1). Pursuant to the grievance procedure in the collective bargaining agreement between Roadway and the union, Complainant was permitted to continue working pending an appeal of his discharge to the Ohio Joint State Grievance Committee (OJSC), which was held on January 20, 1999. The OJSC upheld the Complainant's discharge. (CX 31).

On October 2, 1998, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had terminated his employment because he refused to drive while fatigued and that his refusal to drive was protected activity under the STAA, thus discriminating against him in violation of section 31105 of the STAA. On May 9, 2000, the Secretary dismissed the complaint. The Complainant then filed an objection and a hearing was scheduled before the undersigned. (CX 34). By Summary Decision issued on April 17, 2001, the undersigned found that Complainant was not engaging in protected activity on the instances noted in the aforementioned warning letters dated: December 5, 1997; August 7, 1998; August 19, 1998; August 20, 1998; August 21, 1998; August 25, 1998; and September 12, 1998.

II. ISSUES

The issues to be resolved in this case are:

1. Whether Complainant was engaging in protected activity under the STAA when he took time off of work to recover from knee and back pain in December 1997 and incurred an unexcused absence warning letter.

2. Whether Complainant was engaging in protected activity under the STAA when on January 12, 1998 he recorded time when he was taking a fatigue break in the cab of the truck as "on duty/not driving," instead of as "off duty."

3. Whether Complainant was engaging in protected activity under the STAA when he incurred an unexcused absence warning letter dated, January 30, 1998 for time he had taken off to recuperate from knee surgery.

4. Whether Complainant was engaging in protected activity under the STAA when he took a fatigue break on July 16, 1998, which caused him to fail to make a running time.

5. Whether Respondent would have discharged Complainant in the absence of protected activities.

6. Whether Complainant is entitled to relief under the STAA.

III. STIPULATIONS

The parties have stipulated to the following facts. Accordingly, I find that:

1. Complainant was an employee of Respondent, within the meaning of the employee protection provisions of the STAA.

2. Complainant operated commercial motor vehicles in interstate commerce for Respondent, on the highways, with a gross vehicle weight rating of 10,001 pounds or more.

3. Respondent is an employer within the meaning of the employee protection provisions of the STAA.

4. Complainant's complaint to the Secretary of Labor was timely as to all issues of alleged protected activity in this case.

5. Complainant's notice of objection to the Secretary's preliminary order and request for hearing was timely.

6. The Office of Administrative Law Judges has jurisdiction over the parties and subject matter of this proceeding.

7. During the period covered by January 30, 1998 to March 18, 1998, Complainant had knee surgery and was recovering from knee surgery. During this period Complainant's ability and alertness were so impaired that he could not safely operate a commercial motor vehicle in interstate commerce.

IV. FACTUAL BACKGROUND

David Blackann's Hearing Testimony

Complainant currently resides in Canfield, Ohio, and has worked as a truck driver for approximately 15 years. (Tr 16). Complainant holds a commercial driving license from the State of Ohio with endorsements to transport double and triple trailer combinations and hazardous materials. (Tr 18). He began working for Respondent on October 5, 1990. Throughout the approximate nine years that Complaint worked for Respondent, he logged about 900,000 miles and received various safety awards. (Tr 17).

Complainant testified that when he was based in North Lima, Ohio, he drove runs primarily between the North Lima, OH, terminal and Harrisburg, PA, Hagerstown, MD,

Buckhorn, PA, or Mifflintown, PA. (Tr 18). When he was dispatched, he was required by Respondent, as well as the Department of Transportation ("DOT"), to do a pre- trip vehicle inspection, which entails a detailed inspection of the entire truck requiring climbing, bending, squatting, reaching, and lifting. (Tr 20-34). This activity took approximately fifteen to thirty minutes to perform. (Tr 36).

December 23, 1997 Warning Letter

Complainant received a warning letter signed by the terminal manager for an unexcused absence, because he was "off the board" from 7:30 pm on December 12, 1997 until 11:45 pm on December 15, 1997. (Tr 37, CX 3). Complainant testified that under the Respondent's policy, a driver's name-card is put "on the board" when the driver becomes eligible for possible dispatch. (Tr 37). He contends that he was not on the board during the time at issue because he was in a great deal of pain and could not perform his job safely. (Tr 38). He was suffering from right knee and back pain. (Tr 38). Complainant returned to work after resting his knee and back for a few days. (Tr 41).

Complainant testified that on December 18, 1997, he had turned in two doctor's notes which were then time stamped by Respondent. (Tr 42-43). Complainant turned in a slip dated December 17, 1997, from Dr. Boniface, who was treating him for his knee condition and a slip dated December 18, 1997, stating that he had been seen for an office visit by Dr. Lytle, who was treating him for cervical radiculopathy. (Tr 42-43, RX 18).

Complainant testified that Mr. Swick had explained to him Respondent's sick day policy which required drivers to submit a doctor's slip with the dates and types of disabilities in order for absences to be considered "excused." Complainant testified that he also received an interoffice memorandum issued by Mr. Swick in 1995, regarding Respondent's sick day policy. (Tr 148).

January 20, 1998 Warning Letter

Complainant testified that he received a warning letter dated January 20, 1998 stating, "[o]n 1/12/98/ you logged your break on duty in violation of company policy." (Tr 51, CX 5).

On January 11-12, 1998 Complainant's route was from North Lima to Harrisburg which typically took five hours each way. (Tr 48). Complainant testified that for a trip of ten hours he was permitted to log "off-duty" for two hours but that on this trip he had taken two ninety minute fatigue breaks for a total of three hours of off-duty time. (Tr 49).

On January 11, 1998, Complainant logged the ninety minutes from 5:30 a.m. to 7:00 a.m., which was a fatigue break, as "off duty." Complainant testified that on January 12, 1998, he also took a ninety minute fatigue break, however, he entered the time from 8:30 a.m. to 9:30 a.m. as "off-duty" and the extra half hour over the allotted break time from 9:30 a.m. to 10:00 a.m. as "on duty/not driving." (Tr 143, RX 13). He said that for the entire ninety minute break he was

sleeping in his truck. (Tr 155). He explained that he believed that on January 12, 1998, according to the DOT instructions, he should have logged the entire ninety minutes as "on duty/not driving," but did not because he had been instructed by Mr. Swick to log the first hour of a fatigue break as "off duty" and the remaining half hour as "on duty/not driving." (Tr 145).

Complainant also testified that his logging inconsistency was due to his belief that Respondent's log book instructions differed from the DOT's instructions. He believed that if he followed the DOT regulations, he would violate Respondent's policy and in turn receive a letter of warning for not logging time in the proper line. (Tr 142). He therefore falsified his logs to show "on duty" time as "off duty" time in order to accommodate Respondent's policy. (Tr 213).

April 1, 1998 Warning Letter

Complainant testified that he received a warning letter dated April 1, 1998 stating:

> On 3/27/98 you violated our policy, contract, and D.O.T. regulations, by refusing to supply the company with information from your medical provider substantiating the type of medical impairment that is currently preventing you from working. Your absence from 1/30/98 to the present, and continuing, will therefore be considered an unexcused absence.

(Tr 82- 84,CX 22).

Complainant testified that he had knee surgery on January 30, 1998 and that while he was recovering he was unable to perform his job. Complainant further explained that he called his supervisor, Bob Scuzza, on the day of the surgery and informed him that he was undergoing surgery and requested that his name be placed on the "sick board," so that he would not be called in to work. (Tr 59). Complainant said that he also told Bob Scuzza that he would not be able to work for four to six weeks. (Tr 60).

Complainant testified that he also spoke with Ms. Wares, who worked in the human resources department at Respondent's corporate headquarters in Akron, about his surgery, and inquired about the proper procedure for turning in a doctor's excuse. (Tr 61). Complainant said that he also requested leave under the Family and Medical Leave Act during this absence but was told by Ms. Wares that he would not qualify for leave under the Act. (Tr 165). Complainant testified that he told Ms. Wares that he had a doctor's excuse from Dr. Boniface, dated February 5, 1998, stating that he was totally disabled from January 30, 1998 for an estimated four to six weeks, but that the slip did not provide a diagnosis and informed him that he could write on the excuse that he underwent knee surgery. (Tr 68-69). Ms. Wares also told him that this note should be followed by a more formal Doctor's note, listing a diagnosis. (Tr 158). He was informed that he could turn in the slip when he returned to work. (Tr 61). However, Complainant also testified that he later received a conference call from Ms. Wares and Mr. Swick and was informed that he had to turn in a doctor's excuse with a diagnosis prior to returning to

work. (Tr 65-67).

Complainant testified that he handwrote, "had knee surgery," on the slip provided by Dr. Boniface, and signed his name below and said that he gave the excuse to his co-worker, Greg Shadle, to turn in at work. (Tr 70, CX 17). Complainant testified that he was unable to procure a second note from Dr. Boniface before he received the warning letter because Dr. Boniface was out of town. (Tr 164).

Complainant testified that on March 23, 1998, he received upon his request, a letter from Respondent's human resources department, stating that he was on, "an extended sick leave-personal effective 1/29/98," which he thought meant that he was off the board. (Tr 88, CX 20).

Complainant testified that on March 27, 1998 he drove to the terminal to drop off a "release to work slip," signed by Dr. Lytle, dated March 26, 1998, which indicated that he could return to work on April 15, 1998. Complainant said that he returned to work on April 24, 1998. (Tr 78- 80).

Upon his return on April 24, 1998, Complainant turned in three release notes: one from Dr. Boniface with a release date of March 18, 1998 (CX 19); and two from Dr. Lytle with the release dates of April 15, 1998 (CX 21) and April 24, 1998 (CX 24). (Tr 70-82). Complainant explained that although he was released to work by Dr. Boniface regarding his knee surgery for March 18, 1998, he was also under the care of Dr. Lytle for his back pain, and that the doctor did not finally release him for work until April 24, 1998. (Tr 71-77, CX 15, 16).

4/28/98 Disciplinary hearing

Complainant testified that a hearing was held on April 28, 1998 regarding his work record. As a settlement to the April 28, 1998 local hearing, Complainant was suspended due to his accumulated work record from May 20, 1998 until June 18, 1998. (RX 3). (Tr 90).

July 20, 1998 Warning Letter

On July 20, 1998, Respondent issued a warning letter to Complainant for running late on a trip from Mifflintown, Pennsylvania to North Lima, Ohio. (CX 29). On July 15, 1998, Complainant was called into work at 2:45 p.m. and reported for work at about 4:45 p.m. He left North Lima, OH at about 5:15 p.m. Complainant stopped for a one-half hour break at Snow Shoe, PA from 8:34 to 9:15 p.m. which he logged in his log book as "off duty." He resumed driving and arrived at Mifflintown, PA at 10:45 p.m. At Mifflintown, Complainant performed his post trip inspection and then traded the truck off to another driver and continued driving in a different truck. (Tr 189, 217). Complainant left Mifflintown at 11:15pm. (CX 27). Complainant testified that by 12:00 a.m. on July 16, 1998 he became tired and his driving became "sloppy." (Tr 102). Complainant said that he determined that it was unsafe to continue driving and that at Reedsville, PA, he called Scott Oehnstrom, a dispatcher, and told him that he needed

to take a fatigue break and sleep because he had driven through some heavy construction in a "junk truck" that wore him out on the way to Mifflintown. (Tr 103). Complainant said that he rested for approximately one-half hour at Reedsville. (Tr 101).

Complainant testified that he resumed driving at 12:45 a.m. on July 16, 1998 and drove until 2:30 am when he unexpectedly became sleepy again and was unable to continue driving. Complainant testified that from 2:30 a.m. on July 16, 1998 to 5:00 a.m. he slept in the cab of the truck. (Tr 103). He resumed driving at 5:00 a.m. and returned to North Lima at 7:30 a.m., which was beyond the allotted running time. (Tr 106).

In protest to the warning letter, Complainant wrote that the truck was "junk," and that he was worn out and had to pull over and rest due to effort required to drive the truck. Additionally, Complainant noted that even though he remained in the truck and was sleeping, he had recorded this time in his log book in accordance with Respondent's policy as"off duty" instead of as "on duty not driving." (CX 29, Tr 106). Complainant testified that the drive was difficult and tiring due to the sub-par condition of the truck. Complainant felt that the truck-tractor was badly aligned and the steering pulled hard to the right. (Tr 98). He said that the condition deteriorated as the trip progressed making driving more tiring, but that he didn't consider the truck unsafe to drive. (Tr 108).

*Blackann's Suspension*s

In addition to Complainant's suspension from May 20, 1998 until June 18, 1998 due to his accumulated work record, Complainant also served a five day suspension from October 9,1997 through October 13, 1997 as result of not reporting a drunk driving citation which is required under Respondent's policy. (RX 5). Complainant also served a fourteen day suspension due to his accumulated work record from December 20, 1996 through January 3, 1997. (RX 6).

Blackann's Discharge

On September 17, 1998, Complainant received a letter regarding his discharge from Roadway. A local hearing had been held at Respondent's offices on September 15, 1998 regarding Complainant's accumulated work record, including a total of 7 warning letters. (CX 30). Complainant testified that January 20, 1999 was the last day he worked for Respondent. (Tr 110).

Complainant also testified that after his discharge he diligently sought comparable employment with other trucking companies. (Tr 115-121). He said that one reason many companies would not hire him was due to having a DWI on his driving record. (Tr 197). Complainant was later hired by B&D Trucking and that he after he left B&D trucking he went to work for Blacktop, where he is currently employed on a full-time basis at $10.00 an hour. (Tr 191).

Fatigue Slide

Complainant testified that a "fatigue slide" means that a driver can request 8 hours off after 16 hours off duty. After 16 hours off duty, a driver can request an additional 8 hours off duty, by calling Respondent and requesting that his name be taken from the board for an additional 8 hours. (Tr 166).

Gary Swick's Hearing Testimony

Mr. Swick testified that he is employed by the Respondent and has worked as the Assistant Relay Manager in North Lima, Ohio since August, 1992. (Tr 219). He said that he made the decision to discharge the Complainant which led to the September 15, 1998 hearing regarding Complainant's work record. (Tr 369).

Mr. Swick testified that he considered the infractions starting on July 16, 1998 through September 8, 1998 in making the decision to discharge the Complainant. (Tr 369). He said that after Complainant returned from a thirty day suspension which ended on June 18, 1998, he decided to pursue a discharge because the Complainant continued to accumulate warning letters. (Tr 362). He testified that the infractions prior to that date had been resolved by the thirty day suspension. (Tr 366).

Mr. Swick reviewed the North Lima terminal sick leave policy. He said that a memo on sick leave was issued on January 30, 1995, which stated, "when you are on an unpaid sick call; if you would like us to consider a doctor's slip in determining if it is an excused absence, then the days and type of disability must be on the doctor slip, along with the doctor's name and address." (Tr 220, RX 10). Mr. Swick stated that depending on circumstances, a driver could be disciplined if a doctor's excuse was not submitted. (Tr 223). He recalled discussing this rule with the Complainant on numerous occasions prior to his discharge. (Tr 387). Mr. Swick testified that the policy in the memo was not addressed in the collective bargaining agreement between Roadway and the Teamsters. (Tr 220, 384).

Mr. Swick also addressed the December 23, 1997 warning letter for an unexcused absence. He stated that Complainant had not turned in a proper doctor's excuse. (Tr 381). Mr. Swick testified that the doctor's excuse submitted by the Complainant was not accepted because it failed to list a diagnosis. (Tr 382, RX 9). Mr. Swick also stated that the excuse, dated December 17, 1997, was not accepted because it did not state that Complainant was unable to work from December 12-15, 1997, the days of the unexcused absences. (Tr 389). Mr. Swick said that his decision to discharge Complainant was not influenced by the December 23, 1997 warning letter regarding an unexcused absence because that warning letter had been issued prior to Complainant's suspension. (Tr 240).

Mr. Swick testified that he issued a warning letter on April 1, 1998, regarding Complainant's unexcused absences from January 30, 1998 until March 27, 1998. (Tr 394).

Complainant had turned in three doctor's slips for this absence. Mr. Swick testified that the note from Dr. Boniface, dated February 5, 1998, was not adequate because it did not list a diagnosis except for a notation made by the Complainant that he had undergone knee surgery. (Tr 395, RX 16). He said that the Complainant had agreed to supply a note from Dr. Boniface that stated the diagnosis and the length of disability, but failed to do so. (Tr 397). Complainant next turned in a slip from Dr. Lytle, dated March 26, 1998. (TR 356, RX 17). Mr. Swick testified that he did not accept this slip because the note was from a different doctor and because it did not list a diagnosis. (Tr 397). Mr. Swick also said that the note stated that the Complainant was under Dr. Lytle's care from December 18, 1998 through April 15, 1998, and that he could return to work on April 15, 1998. These did not accurately reflect the dates of the Complainant's unexcused absences. (Tr 398).

Mr. Swick explained that his decisions on whether to excuse an absence are individually based on the circumstances and that he had many discussions with Complainant regarding sick leave and doctor's slip policies. (Tr 226). Mr. Swick testified that he allowed some drivers to turn in slips upon return from disability or sick leave, but that the Complainant was required to submit a slip before he returned from his knee surgery in April of 1998 due to the length of Complainant's disability. (Tr 421). Mr. Swick added that in the case of one of Complainant's co-worker's seven month disability due to Crohn's disease, the employee had turned in a slip prior to his return. (Tr 422).

Mr. Swick testified that the April 1, 1998 warning letter stated that Complainant had violated Roadway's policy, and DOT regulations by not submitting adequate physician slips. (Tr 422). According to Mr. Swick the DOT regulations do not require such slips. (Tr 424).

Mr. Swick testified that he issued a warning letter to the Complainant on January 20, 1998 for improperly logging break time as "on duty." (Tr 390, RX 12). He said that Complainant's log book for January 12, 1998 showed that Complainant had logged break time from 9:30 am to 10:00 am, when he was not driving, as "on duty/not driving." (Tr 391). Mr. Swick testified that the time should have been listed as "off duty," because a driver is relieved of duty for his rest stops. (Tr 391). He said that Roadway's drivers have been instructed that time spent sleeping in the cab of a truck that is legally parked should be listed in the log as "off duty," regardless of whether the time is over the allotted amount of break time for a given trip. (Tr 392).

Mr. Swick stated that the Complainant had gone over his allotted break time on both January 11 and 12, 1998, but that he had properly logged the additional thirty minutes as "off duty" on January 11, 1998 and did not receive a warning letter for that date. (Tr 393).

Mr. Swick testified about the July 20, 1998 warning letter regarding Complainant's running late on a trip from Mifflintown, to North Lima. (Tr 378, RX 7). Complainant protested the letter on the basis that the truck he had driven was "junk," causing him to be fatigued. (Tr 377). He said that he did not find Complainant's protest credible because Complainant had used the same language in prior protests and because the log submitted by Complainant from the trip

did not mention the condition of the truck. (Tr 378). Mr. Swick testified that the log shows that Complainant marked that he had been off duty from 2:30 am to 5:00 am, for a two and a half hour fatigue break. The log shows that the Complainant had drawn lines from the off duty line down to the on duty line at 3:30 am and 4:30 am but had scratched theses lines out. (Tr 379). Mr. Swick noted that Roadway encourages drivers feeling fatigued to pull over and rest. (Tr 434). He testified that drivers who pull over for break time over the allotted break may or may not be disciplined by Roadway. (Tr 435). Mr. Swick testified that he probably would not have disciplined the Complainant for running late if he had believed him that he had become worn out because of the condition of the truck. (Tr 438). Mr. Swick stated that this warning letter was used in deciding to discharge the Complainant, but that Complainant would have been fired regardless of this letter. (Tr 380).

Mr. Swick testified that he has never discharged a driver for using profanity directed at him. (Tr 445). He testified that the instance of the Complainant's use of profanity as recorded in the August 7, 1998 warning letter was not a primary reason for Complainant's discharge. (Tr 446, RX 19).

Mr. Swick testified that he issued the September 12, 1998 warning letter because the Complainant reported for work twelve minutes late. (Tr 446). He did not think this was not a serious offense and that this incident alone would not have led to Complainant's discharge. (Tr 448).

Mr. Swick testified that Complainant continued to receive warnings after the September 15, 1998 discharge hearing for violating running times. (Tr 374, RX 25, 26, 27, 28, 29). Mr. Swick contends that these warnings were not taken into consideration in the firing of Complainant or raised at the local and Ohio Joint State Committee hearings (hereinafter "OJSC" hearings). (Tr 450).

Michael Schafer's Hearing Testimony

Mr. Schafer testified that he has been driving for Respondent since 1988 and is based out of the North Lima terminal. Mr. Schafer also testified that he was elected to be the union steward at the North Lima terminal and secretary/treasurer and business agent of the local 337. (Tr 251). Mr. Schafer testified that he has attended hundreds of local grievance hearings, and that he did not believe that Complainant's work record justified discharge. (Tr 255-263). He testified that the number and nature and of Complainant's warning letters were not extraordinary in comparison to those issued against other drivers who have not been suspended or discharged. (Tr 280).

Mr. Shafer testified that from his experience in dealing with local grievances and sitting as a witness at the OJSC on numerous occasions, he has found that drivers are normally only discharged for serious infractions. (Tr 283). Mr. Shafer stated that discharges upheld by the OJSC are normally based on "cardinal sins," such as discipline for dishonesty, drug use, and

perhaps a serious accident. (Tr 283).

Mr. Schafer testified that if he had exceeded an allowed break time during a tour out of duty and was still resting in the cab of one of Respondent's trucks, he would record that additional break time as "on duty/not driving." (Tr 270).

Mr. Schafer testified that Respondent's sick leave policy as stated in Mr. Swick's memorandum, dated January 30, 1995 (RX 10) has never been agreed to by the Local 377. (Tr 276). Mr. Swick also stated that the sick leave policy is an issue that is normally provided for in the collective bargaining agreement which is to be negotiated locally. (Tr 277).

Michael Harrison's Hearing Testimony

Mr. Harrison testified that he began working for Respondent in 1989. (Tr 291). He was transferred to the North Lima terminal in 1992 where he worked as a "switcher," until he was transferred to Buffalo, New York, in April of 1997. (Tr 292-293). Mr. Harrison is currently employed by Respondent at the Akron terminal. (Tr 290).

Specifically, Mr. Harrison testified regarding the maintenance practices of the North Lima terminal. Mr. Harrison testified that while working at the North Lima terminal he was responsible for putting equipment out of service. He said that his duties included inspecting the tractors and placing a red tag on any defective or possibly defective piece of equipment that needed to be inspected by a mechanic and notifying Mr. Swick and the dispatcher of the condition. (Tr 295). He testified that the North Lima terminal did not have a garage so that if he was unable to have the tractors fixed quickly and easily he would call an outside vendor to do repairs. (Tr 292, 308). Mr. Harrison was aware of situations where defective equipment that he had tagged was dispatched before being repaired. (Tr 297).

Mr. Harrison testified that many of Respondent's tractors were old and worn out. (Tr 294). He added that based upon his experience as a driver he found that driving defective equipment caused fatigue. (Tr 300).

Jack Smith's Hearing Testimony

Mr. Smith testified that he has been a driver since 1972 and began driving for Respondent in 1977. (Tr 311). Mr. Smith worked for Respondent in Indianapolis, Indiana, until 1987 and then in salt Lake City, Utah, until 1994 when he was transferred to the North Lima terminal. (Tr 311). He is currently an alternate steward for Teamsters Local 377. (Tr 312).

Mr. Smith testified that he has missed periods of work due to illnesses while employed at North Lima. (Tr 313). He testified that after these absences he generally did not provide a doctor's note stating treatment, diagnosis, or disability. He recalled that one time when he missed seven months for surgery and provided a note only listing dates that he was under his physicians

care and the release to work date, he did receive a warning letter for having an unexcused absence. (Tr 313-315).

Mr. Smith testified that when he takes sick leave he does not turn in a doctor's note giving a diagnosis. (Tr 318). He testified that when he turns in a doctor's excuse it lists only the dates that he was off due to illness. (Tr 319).

Mr. Smith testified that he drives a tour of duty from North Lima to Harrisburg or Hagerstown and back to the terminal. (Tr 316). Mr. Smith testified that conditions such as weather, steering pulls, and lack of sleep can cause a driver to require a fatigue break. (Tr 317). He said that when he takes a fatigue break over the two hour time limit he logs the additional time as "on duty/not driving," and makes a notation that the break was due to fatigue. (Tr 316).

Mr. Smith testified that he has spent break time in the cab of the truck. He said that in these instances, he logs the first two hours as "off duty," and any additional time spent resting or relaxing as "on duty/not driving." (Tr 325). He explained that this manner of logging break time had been explained to him as the longstanding policy. (Tr 326). Mr. Smith testified about the log books issued by Roadway to drivers. (Tr 331, CX 7). He said that when the log books are issued to drivers there is a notice printed on the front page. (Tr 331). The notice gives driving time guidelines, including, "9.5 - 10 hours driving, you may log as off duty meal/rest stop of 2 hours. ... During these stops you are relieved of duty and Roadway Express assumes the responsibility for vehicle and cargo, provided the vehicle is properly parked." (Tr 332). Mr. Smith feels that the driver is responsible for the vehicle during any time spent resting beyond the two hours of permitted break time. (Tr 333).

Mr. Smith testified that he has used profane language in addressing Mr. Swick on more than one occasion. He admitted that this has never led to disciplinary action. (Tr 324).

Mr. Smith has been a union steward for the North Lima terminal for approximately three years. (Tr 319). Mr. Smith testified that he has attended 15-20 local hearings, including the local hearing which was held at the teamsters Local #377 on September 15, 1998 regarding Complainant's discharge. (Tr 319). He believes that the offenses in Complainants accumulated work record relied upon in the hearing leading to Complainant's discharge were minor offenses that would not normally lead to discharge. (Tr 321 - 324).

Mr. Smith testified that he could estimate the age of the truck that the Complainant had been driving on July 15, 1998 from North Lima, Ohio to Mifflintown, Pennsylvania by reading the vehicle number listed in Complainant's log from that date. He determined that the Complainant had probably been driving a mid-1980's tractor on that day. (Tr 328).

Curtis Penrose's Hearing Testimony

Mr. Penrose, a driver with Roadway Express based out of the North Lima terminal, was

also called by the Complainant to testify regarding Roadway's policies. At the time of the hearing, Mr. Penrose had been a truck driver for approximately twenty-eight years and had been a driver for Roadway since 1986. (Tr 335). Mr. Penrose testified that over the years he had missed work due to illness and had turned in doctor's slips on some of those occasions. He also said that many of the doctor's slips he did turn in did not include a diagnosis or nature of disability and that after an absence, he had never been disciplined for not turning in a slip, or for turning in an incomplete slip not listing a diagnosis. (Tr 336).

Mr. Penrose testified that he has attended meetings of the OJSC and has represented drivers at local hearings as the shop steward. (Tr 345). Mr. Penrose was asked to review Respondents's Exhibit 2, which lists Complainant's warning letters, hearing, and suspension between December 5, 1997 and September 8, 1998. Mr. Penrose said that other drivers from the North Lima terminal had worse accumulated work records than Complainant but had not been discharged. He also said that after reviewing Complainant's work record, he would not have expected him to have been discharged. (Tr 348-351). Mr. Penrose further stated that he had sworn at Gary Swick, in the same manner as Complainant, numerous times, but he has never been disciplined for his actions. (Tr 350). Mr. Penrose testified that since he was transferred to the North Lima terminal in 1992, there have been two drivers, other than the Complainant, who have been discharged and had their discharge upheld by the Ohio Joint State Committee. He said that one of the terminated drivers had been discharged for multiple accidents in a nine month period, and the other for dishonesty. (Tr 343).

Mr. Penrose has exceeded the two hour break time guideline for a ten hour driving shift. (Tr 341). He said that he has never driven a truck with a sleeper berth while employed by Roadway and that when he takes breaks, he sleeps in the cab of the truck. (Tr 342). Mr. Penrose explained that he logs the two hour break time in a ten hour shift as "off duty". However, when he breaks for additional time over the two hours, he records the time as "on duty/not driving". This is due to the fact that after the two hour break time, although he is not driving, he is still working for Roadway because he is responsible for the equipment and cargo. (Tr 343). He added that he records additional break time over the two hours allowed in a ten hour shift as "on duty/not driving" in order to comply with DOT regulations. He explained that his understanding of the DOT regulations is that any time over two one-hour stops, when there is no sleeper berth on the truck, should be logged on as "on duty/not driving." (Tr 356).

Mr. Penrose said that he was not aware of a written policy regarding doctor's slips. (Tr 355). Mr. Penrose recalled speaking with Mr. Swick regarding doctor slips. (Tr 354). He said that Mr. Swick has told him that the doctor's slips should state a diagnosis. (Tr 354.) He also said that Mr. Swick has returned deficient slips to him, so that he could return to the doctor's office and have a diagnosis listed by the doctor or a nurse. (Tr 354).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a claim for discrimination under the Act, the claimant bears the initial burden of

establishing a prima facie case of discrimination. In order to meet that burden, the claimant must establish the following elements: (1) that he was engaged in an activity protected under the STAA; (2) that the Respondent was aware of the activity; (3) that he was subject of adverse employment action; and (4) that a causal link exists between his protected activity and the adverse action of his employer. *Kahn v. United States Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Bechtel Const. Co. v. Sec'y of Labor*, 50 F. 3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). Once the employee establishes a prima facie case, "the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. If the defendant is successful in rebutting the inference of retaliation, the employee bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination." *Moon v. Transport Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987).

Protected Activity

In this matter, four of the warning letters received by the complainant document the alleged protected activities for which the complainant contends that he was unfairly discharged from his position with Roadway. These letters were issued on the following dates for the following infractions:

1.	December 23, 1997	Unexcused absence from 19:30 on 12/12/97 - 23:45 on 12/15/97.
2.	January 20, 1998	Failure to follow instructions. Logged break time as "on duty" on 1/12/98.
3.	April 1, 1998	Unexcused absence from 7:30 on 1/30/98 to 12:95 on 4/27/98.
4.	July 20, 1998	Failure to meet schedule. Ran late on trip from Mifflintown to North Lima, 8.15 hours on a 5 hour drive.

The first incident of alleged protected activity occurred when Complainant was absent from work from December 12, 1997 until December 15, 1997. Complainant received a warning letter signed by the terminal manager for an unexcused absence, because he was "off the board" from 7:30 pm on December 12, 1997 until 11:45 pm on December 15, 1997. (Tr 37, CX 3).

Complainant testified that under Respondent's policy, a driver's name-card is put "on the board" when the driver becomes eligible for possible dispatch. (Tr 37). Complainant said that he was not on the board during the time at issue because he was in a great deal of pain and could not perform his job safely. (Tr 38). The reasons were knee and back pain. (Tr 38). Complainant contends that he was disciplined for refusing to drive when driving would have been in violation of 49 C.F. R. §392.3. Respondent, however, contends that Complainant was not disciplined for refusing to drive, but was instead disciplined for not following Respondent's policy for submitting a doctor's excuse. (Tr 240).

Complainant testified that on December 18, 1997, he had turned in two doctor's slips. (Tr 42-43). One, dated December 17, 1997, was from Dr. Boniface, who was treating him for his knee condition. The second, from Dr. Lytle, dated December 18, 1997, noted an office visit and treatment for cervical radiculopathy. (Tr 42-43). Mr. Swick said that Complainant had not turned in a proper doctor's excuse because the slips failed to list a diagnosis or the relevant dates of disability. (Tr 381-389, CX 1, CX 2).

In his decision to discharge Complainant, Mr. Swick said he considered only infractions occurring between July 16, 1998 and September 8, 1998. He explained that all problems prior to Complainant's suspension were resolved by that action and were not considered in the decision to discharge. Specifically, Mr. Swick said he did not consider the December 23, 1998 warning letter in his decision to discharge the complainant. (Tr 352-369).

Because this incident was not considered in the decision to discharge Complainant, the issue of its status as a protected activity cannot be adjudicated in this proceeding. However, the same issue is fully addressed later in this decision when I address the Complainant's inability to comply with Respondent's absentee policy.

The second incident of alleged protected activity concerns a warning letter received by the Complainant for improperly recording time in his log book. On January 20, 1998, Complainant received a warning letter stating that he had failed to follow directions because he had improperly recorded break time as on-duty time in his log book. (Tr 51, CX 5).

Complainant said his route on January 11-12, 1998 was from North Lima to Harrisburg which typically took five hours each way. (Tr 48). For a trip of ten hours drivers are permitted to log "off-duty" for two hours. On this trip he had taken a ninety minute fatigue break each way for a total of three hours. (Tr 49).

On January 11, 1998, Complainant had logged the entire ninety minute break as "off duty." (RX 12). On January 12, 1998 Complainant took a ninety minute fatigue break and entered the time from 8:30 a.m. to 9:30 a.m. as "off-duty" and the extra half hour over the allotted break time from 9:30 a.m. to 10:00 a.m. as "on duty/not driving." (Tr 143, RX 13). Complainant said that he was sleeping for the entire break. (Tr 155).

Complainant explained that he believed that on January 12, 1998, according to the DOT instructions, he should have logged the entire ninety minutes as "on duty/not driving," but did not because he had been instructed by Mr. Swick to log the first hour of a fatigue break as "off duty" and the remaining half hour as "on duty/not driving." (Tr 145).

Mr. Swick recalled issuing the warning letter to the Complainant on January 20, 1998 for improperly logging break time as "on duty." (Tr 390, RX 12). Complainant's log book for January 12, 1998 showed that Complainant had logged break time beyond the allotted two hour break time for the trip, from 9:30 am to 10:00 am, as "on duty/not driving." (Tr 391). Mr. Swick

explained that the time should have been listed as "off duty," because a driver is relieved of duty for his rest stops. (Tr 391). Mr. Swick said that Roadway's drivers have been instructed that time spent sleeping in the cab of a truck that is legally parked should be listed in the log as "off duty," regardless of whether the time is over the allotted amount of break time for a given trip. (Tr 392).

Mr. Swick said that the Complainant had gone over his allotted break time on both January 11 and 12, 1998, but that he had properly logged the additional thirty minutes as "off duty" on January 11, 1998 and did not receive a warning letter for that date. (Tr 393). Mr. Swick explained that he did not issue the warning letter because Complainant had taken a break due to fatigue, but because of the improper entry in the log book. (Tr 393).

Mr. Schafer, Mr. Smith, and Mr. Penrose, also Roadway drivers, testified that if they exceeded an allowed break time during a tour out of duty and were still resting in the cab of one of Respondent's trucks, they would record that additional break time as "on duty/not driving." (Tr 270, 316).

Mr. Smith said that when he has spent break time in the cab of the truck he logs the first two hours as "off duty," and any additional time spent resting or relaxing as "on duty/not driving." (Tr 325). He testified that this manner of logging break time had been explained to him as the longstanding policy. (Tr 326). He explained that when the log books are issued to drivers there is a notice printed on the front page. (Tr 331). The notice gives driving time guidelines, including, "9.5 - 10 hours driving, you may log as off duty meal/rest stop of 2 hours. ... During these stops you are relieved of duty and Roadway Express assumes the responsibility of vehicle and cargo, provided the vehicle is properly parked." (Tr 332, CX 7). Mr. Smith testified that the driver is responsible for the vehicle during any time spent resting beyond the two hours of permitted break time. (Tr 333).

Mr. Penrose testified that he has exceeded the two hour break time guideline for a ten hour driving shift. (Tr 341). He said that he logs the two hour break time in a ten hour shift as "off duty," but that when he breaks for additional time over the two hours, he records the time as "on duty/not driving," because after the two hour break time, although he is not driving, he is still working for Roadway due to the fact that he is responsible for the equipment and cargo. (Tr 343). He said that his understanding of the DOT regulations is that any time over two one-hour stops, when there is no sleeper berth on the truck, should be logged on as "on duty/not driving." (Tr 356).

Complainant was not disciplined in this case for a refusal to drive. Complainant was disciplined for failing to follow Roadway policy. Complainant testified that he was aware of the policy and had been instructed on the policy by Mr. Swick. Complainant contends that this policy requires a driver to violate the DOT regulations making his action a protected activity. However, the Surface Transportation Assistance Act does not grant protection for such action.

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. §§ 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . . Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. §§ 31105(a)(1)(B)(I).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 94 STA 55 (Sec'y Aug. 4, 1995).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C §§ 31105(a)(2).

The evidence shows that the employer followed the requirements of Section 405 of the Surface Transportation Assistance Act as amended and re-codified, 49 U.S.C. § 31105, and its implementing regulations, 29 C.F.R. Part 1978 which provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules. The difference of interpretation in this instance concerned the recording of the trips. As argued by the Respondent, Complainant's actions regarding this warning letter are not protected by the Act. The incident did not involve either a refusal to drive or the commencement of any proceeding relating to a Federal Motor Carrier Safety violation. It was merely a dispute about company policy in completing documentation. Accordingly, Complainant has failed to show the existence of a protected activity.

The third incident of alleged protected activity involves a second incident of an unexcused absence due to an improper doctor's slip. Complainant underwent knee surgery on January 30, 1998. The parties have stipulated to the fact that during the period covered by January 30, 1998 to March 18, 1998, Complainant was recovering from knee surgery to the extent that his ability and alertness were so impaired that he could not safely operate a commercial motor vehicle.

Complainant asserts that from the date of March 18, 1998 until he returned to work on April 24, 1998, his activity in not driving was protected and that he was unfairly disciplined because of his refusal to drive.

Complainant made attempts to submit doctor's slips regarding this injury and absence, however he failed to follow Respondent's policy. Prior to Complainant's return to work a co-worker submitted a slip signed by Dr. Boniface, dated February 5, 1998, which stated that Complainant was totally disabled from January 30, 1998 for an estimated four to six weeks. This excuse did not provide a diagnosis. (CX 17, Tr 68). Complainant handwrote, "had knee surgery" on the note following instructions he had received from Ms. Wares of human resources. (CX 17, Tr 70).

Complainant was aware of company policy regarding this type of absence from Mr. Swick and from a 1995 memorandum that said:

> When you are on an unpaid sick call, if you would like us to consider a doctor's disability slip in determining if it is an excused versus unexcused absence, then the days and type of disability must be on the doctor slip, along with the doctor's name and address.

(RX 10).

Mr. Swick, Complainant's supervisor, admitted he makes the decisions to discipline a driver for an unexcused absence on a case by case basis. (Tr 226). He explained that he allows some drivers to turn in slips upon return from sick leave, but that due to the length of Complainant's disability, Complainant was required to submit a slip before he returned . (Tr 223).

Two of Complainant's co-workers testified that they have turned in doctor's excuses failing to list a diagnosis. Mr. Smith said his doctor's notes generally do not provide a treatment, diagnosis, or disability, but admitted receiving a warning letter for an unexcused absence on an occasion when he missed seven months and provided a note only listing dates that he was under his physician's care. (Tr 313-315). Mr. Penrose said that his doctor's excuses never provided a diagnosis and he has never been disciplined for not turning in a complete doctor's excuse. (Tr 336).

Complainant was aware that he was expected to provide a doctor's slip listing a diagnosis and a return to work date. Complainant asserts that he was unable to do this due to Dr. Boniface not being in town. Complainant's assertion is not persuasive. Complainant turned in two slips signed by Dr. Boniface prior to his return to work. He could have requested that a diagnosis and return to work date be provided and he could have returned to the office to have the office personnel put these items on the slip if Dr. Boniface was in fact not available.

Nothing in the record indicates that the policy utilized by Respondent in requesting a

diagnosis for a long term absence is selectively enforced. In fact, Mr. Smith testified that he received a warning letter for an unexcused absence on an occasion when he missed seven months and provided a note only listing dates that he was under his physician's care. Because Complainant was fairly disciplined for failing to provide proper doctor's excuse, Complainant has failed to establish that he was disciplined for engaging in protected activity.

The last allegation by Complainant in this matter concerns fatigue caused by operating a mechanically defective truck. In that instance the Complainant said he was so fatigued he could not complete his run in the allotted time.

The Complainant contends that had he not taken a break he would have violated DOT Regulation 49 C.F.R. §392.3 that prohibits driving "when a driver's ability to do so is impaired or likely to be impaired through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the commercial vehicle."

The ARB has held that it is not protected activity if it was the Complainant's fault that he was fatigued. *Eash v. Roadway Express, Inc.*, 1998-STA-28 (ALJ May 11, 2000) citing *A'sst Sec'y & Porter v. Greyhound Bus Lines*, 96-STA-23 (ARB June 12, 1998). The Complainant contends his fatigue was caused by the condition of the truck. He said it was badly aligned and pulled to the right. The Respondent blames the Complainant's failure to take advantage of sufficient opportunities to rest and the fact that the Complainant's allegations are not believable.

To support his allegation the Complainant relies on his own recollection of the trip and the fact that he documented the complaint by calling the Respondent to complain about the equipment. (Tr 98- 106). He has not provided a pre-trip report, a log, or any other documentation pertaining to that trip that supports his recollection.

Several witnesses addressed the issue in their testimony.

Complainant's supervisor, Mr. Swick, testified regarding the July 20, 1998 warning letter resulting from Claimant's late run on July 16, 1998. (Tr 378, RX 7). Mr. Swick testified that Roadway encourages drivers feeling fatigued to pull over and rest. (Tr 434). He admitted that drivers who do so may or may not be disciplined by Roadway. (Tr 435). With regard to the July 16, 1998 incident he explained that he probably would not have disciplined the Complainant for running late if he had believed that he had become worn out because of the condition of the truck. (Tr 438). His main reasons for disbelief of the complainant was that the complainant had used the same language in prior protests and because the log submitted by the Complainant from the trip did not mention the condition of the truck. (Tr 378).

Two witnesses, Mr. Harrison and Mr. Smith, said they were familiar with the equipment used at the North Lima terminal. They agreed that the trucks were old and at times not repaired but could offer no helpful information about the truck or run in question.

The burden is on the complainant to prove a protected activity. He has not presented anything other than his own recollection of the run. There is no pre-trip report or other documentation to prove a violation of a DOT Regulation. The respondent provides a reasonable basis for not believing the complainant. The other evidence, while tending to show the use of old and sometimes defective vehicles, does not address the truck or run relied on by the complainant. It is therefore found the complainant has failed to prove a protected activity on July 16, 1998.

VI. CONCLUSION

In the instant matter the Complainant has failed to show that he engaged in any protected activity as defined by the Surface Transportation Assistance Act. Accordingly, I recommend that the above-captioned claim be dismissed.

RECOMMENDED ORDER

For the reasons set forth above, it is recommended that the complaint of David L. Blackann against Roadway Express, Inc., under §§ 31105 of the Surface Transportation Assistance Act be DISMISSED.

A

GERALD M. TIERNEY
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).